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SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-92754; File No. SR-Phlx-2021-47]

Self-Regulatory Organizations; Nasdaq PHLX LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change to Amend Equity 7, Section 3 to Adopt an Enhanced Market Quality Program

August 25, 2021

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (“Act”)¹, and Rule 19b-4 thereunder,² notice is hereby given that on August 12, 2021, Nasdaq PHLX LLC (“Exchange”) filed with the Securities and Exchange Commission (“SEC” or “Commission”) the proposed rule change as described in Items I, II, and III, below, which Items have been prepared by the Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization’s Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to amend Equity 7, Section 3 to adopt an Enhanced Market Quality Program and a related credit, as described further below.

The text of the proposed rule change is available on the Exchange’s Website at <https://listingcenter.nasdaq.com/rulebook/phlx/rules>, at the principal office of the Exchange, and at the Commission’s Public Reference Room.

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Exchange included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The purpose of the proposed rule change is to amend Equity 7, Section 3 to adopt an Enhanced Market Quality Program and a related credit.

The Enhanced Market Quality Program is intended to provide supplemental incentives to member organizations that meet certain quality standards in acting as market makers for securities on the Exchange by incentivizing such member organizations to make a significant contribution to market quality by providing liquidity at the national best bid and offer ("NBBO") in a large number of securities for a significant portion of the day. Specifically, the Exchange proposes to make a lump sum payment at the end of each month (a "Fixed Payment") to a member organization to the extent that the member organization, through one or more of its MPIDs, quotes at the NBBO for at least a threshold percentage of the time during Market Hours in an average number of securities per day during the month, as specified below. On a daily basis, the Exchange will determine the number of securities in which each of a member organization's MPIDs satisfied the NBBO requirement. The Exchange will aggregate all of a member organization's MPIDs to determine the number of securities for purposes of

the NBBO requirement. The program is open to all member organizations. A member organization may but is not required to be, a registered market maker in any security; thus, the program does not by itself impose a two-sided quotation obligation or convey any of the benefits associated with being a registered market maker. Accordingly, the program is designed to attract liquidity both from traditional market makers and from other firms that are willing to commit capital to support liquidity at the NBBO.

For purposes of the Enhanced Market Quality Program, a member organization will be deemed to quote at the NBBO in a security if it quotes a displayed order of at least 100 shares in the security and prices the order at either the national best bid or the national best offer or both the national best bid and offer for the security. The Exchange will determine the amount of the Fixed Payment that it pays to a qualifying member organization by multiplying the average daily number of its qualifying securities during the month within the range set forth in the highest qualifying Tier (rounded to the nearest whole number) by the applicable amounts set forth in the following tables below and adding the specified lump sum, where applicable. For a particular Tape A security to count towards the threshold for qualifying for the Fixed Payment on a particular day, and receiving the Fixed Payment, a member organization has to quote such security at the NBBO for at least 30% of the time during Market Hours on that day. For a particular Tape B security to count towards the threshold for qualifying for the Fixed Payment on a particular day, and receiving the Fixed Payment, a member organization has to quote such security at the NBBO for at least 50% of the time during Market Hours on that day. A member organization that qualifies for the Fixed Payment for securities in each of Tapes A and B will receive Fixed Payments covering qualifying securities in both Tapes,

but within each Tape, a member organization may only qualify for one Tier during a month.³

The Exchange proposes to set the tiers and the Fixed Payments as follows:

<u>Tape A Securities</u>		
<u>Tiers</u>	<u>Average daily number of securities quoted at the NBBO for at least 30% of the time during Market Hours during the month</u>	<u>Fixed Payment</u>
<u>1</u>	<u>0-199</u>	<u>\$0 per qualified security per month</u>
<u>2</u>	<u>200-299</u>	<u>\$25 per qualified security over 199</u>
<u>3</u>	<u>300-399</u>	<u>\$2,500 + (\$200 per qualified security over 299)</u>
<u>4</u>	<u>400-499</u>	<u>\$22,500 + (\$300 per qualified security over 399)</u>
<u>5</u>	<u>500 or greater</u>	<u>\$52,500 + (\$400 per qualified security over 499)</u>

³ Example 1: A member firm quotes an average of 250 symbols a day in tape A over the 30% time threshold in a particular month. The Fixed Payment due to such firm is calculated as follows: 51 (the number of symbols over 199) times \$25, which equals to \$1,275 for the month. This example shows a tape A Tier 2 Fixed Payment. Example 2: A member firm quotes an average of 350 symbols a day in tape A over the 30% time threshold in a particular month. The Fixed Payment due to such firm is calculated as follows: \$2,500 plus 51 (the number of symbols over 299) times \$200, which equals to \$12,700 for the month. This example shows a tape A Tier 3 Fixed Payment.

<u>Tape B Securities</u>		
<u>Tiers</u>	<u>Average daily number of securities quoted at the NBBO for at least 50% of the time during Market Hours during the month</u>	<u>Fixed Payment</u>
<u>1</u>	<u>0-299</u>	<u>\$0 per qualified security per month</u>
<u>2</u>	<u>300-399</u>	<u>\$100 per qualified security over 299</u>
<u>3</u>	<u>400-499</u>	<u>\$10,000 + (\$200 per qualified security over 399)</u>
<u>4</u>	<u>500 or greater</u>	<u>\$30,000 + (\$300 per qualified security over 499)</u>

Through the use of this incentive program, the Exchange hopes to provide improved trading conditions for all market participants through narrower bid-ask spreads and increased depth of liquidity available at the inside market. In addition, the program reflects an effort to use financial incentives to encourage a wider variety of member organizations to make positive commitments to promote market quality. The Exchange believes that different member organizations may respond to different incentives, and therefore the Enhanced Market Quality Program is designed to promote market quality through quoting activity. The Exchange recognizes that while generally market participants will provide quotes with the intention of trading, market makers and liquidity providers cannot control when counter parties choose to interact with those quotes and therefore the Exchange believes it is beneficial to the market to offer this incentive based on quoting activity directly.

The Exchange notes that it will make the Fixed Payment in addition to other rebates or fees provided under Equity 7, Sections 3 (a) - (c).

2. Statutory Basis

The Exchange believes that its proposal is consistent with Section 6(b) of the Act,⁴ in general, and furthers the objectives of Sections 6(b)(4) and 6(b)(5) of the Act,⁵ in particular, in that it provides for the equitable allocation of reasonable dues, fees and other charges among member organizations and issuers and other persons using any facility, and is not designed to permit unfair discrimination between customers, issuers, brokers, or dealers.

The Commission and the courts have repeatedly expressed their preference for competition over regulatory intervention in determining prices, products, and services in the securities markets. In Regulation NMS, while adopting a series of steps to improve the current market model, the Commission highlighted the importance of market forces in determining prices and SRO revenues and, also, recognized that current regulation of the market system “has been remarkably successful in promoting market competition in its broader forms that are most important to investors and listed companies.”⁶

Likewise, in NetCoalition v. Securities and Exchange Commission⁷ (“NetCoalition”) the D.C. Circuit stated as follows: “[n]o one disputes that competition for order flow is ‘fierce.’ ... As the SEC explained, ‘[i]n the U.S. national market system,

⁴ 15 U.S.C. 78f(b).

⁵ 15 U.S.C. 78f(b)(4) and (5).

⁶ Securities Exchange Act Release No. 51808 (June 9, 2005), 70 FR 37496, 37499 (June 29, 2005) (“Regulation NMS Adopting Release”).

⁷ NetCoalition v. SEC, 615 F.3d 525 (D.C. Cir. 2010).

buyers and sellers of securities, and the broker-dealers that act as their order-routing agents, have a wide range of choices of where to route orders for execution’; [and] ‘no exchange can afford to take its market share percentages for granted’ because ‘no exchange possesses a monopoly, regulatory or otherwise, in the execution of order flow from broker dealers’”⁸

The Exchange believes that the proposed Enhanced Market Quality Program is reasonable because it is similar to other incentive programs offered by the Exchange for displayed orders that provide liquidity, like the Qualified Market Maker Program set forth in Equity 7, Sections 3(c). The proposed Fixed Payment will provide an opportunity to member organizations to receive an additional credit in return for certain levels of participation on the Exchange as measured by quoting at the NBBO. The proposed credit is set at a level that is reflective of the beneficial contributions of market participants that quote significantly at the NBBO for a wide range of symbols. The Exchange believes that it is appropriate to limit applicability of the proposed credit to displayed orders in securities in Tape A and Tape B, and set the credits higher for the Tape A securities, insofar as the Exchange seeks to incentivize member organizations to add liquidity to the Exchange in such securities and improve the market therefor.

The Exchange believes that the proposed Fixed Payments set forth by the Enhanced Market Quality Program are an equitable allocation and are not unfairly discriminatory because the Exchange will offer the same credit to all similarly situated member organizations. Moreover, the proposed qualification criteria requires a member

⁸ Id. at 539 (quoting Securities Exchange Act Release No. 59039 (December 2, 2008), 73 FR 74770, 74782-83 (December 9, 2008) (SR-NYSEArca-2006-21)).

organization to quote significantly at the NBBO therefore contributing to market quality in a meaningful way on the Exchange. Any member organization may quote at the NBBO at the level required by the qualification criteria of the Enhanced Market Quality Program. The Exchange notes that it has a similar Qualified Market Maker Program in which member organizations are required to quote at the NBBO more than a certain amount of time during regular market hours.⁹ For these reasons, the Exchange believes that the proposed Enhanced Market Quality Program Fixed Payments and qualification criteria are an equitable allocation and are not unfairly discriminatory.

The Exchange believes that the proposal is equitable and is not unfairly discriminatory because the Exchange proposes to offer the same Fixed Payments to all similarly situated member organizations. The Exchange also believes that it is equitable and not unfairly discriminatory to establish the Enhanced Market Quality Program only for Tape A and Tape B securities, and set the credits higher for the Tape A securities, because the Exchange has limited resources and the Exchange believes that the best current application of such limited resources is to improve the market quality for Tape A and Tape B securities, as proposed.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will impose any burden on competition not necessary or appropriate in furtherance of the purposes of the Act. In terms of inter-market competition, the Exchange notes that it operates in a highly competitive market in which market participants can readily favor competing venues if they deem fee levels at a particular venue to be excessive, or rebate opportunities

⁹ See Qualified Market Maker Program, Equity 7, Section 3(c).

available at other venues to be more favorable. In such an environment, the Exchange must continually adjust its fees to remain competitive with other exchanges and with alternative trading systems that have been exempted from compliance with the statutory standards applicable to exchanges. Because competitors are free to modify their own fees in response, and because market participants may readily adjust their order routing practices, the Exchange believes that the degree to which fee changes in this market may impose any burden on competition is extremely limited.

In this instance, the proposed changes to the Exchange's credits provided to member organizations do not impose a burden on competition because the Exchange's execution services are completely voluntary and subject to extensive competition both from other exchanges and from off-exchange venues. The proposed Fixed Payment provides member organizations with the opportunity to be given higher credits for quotations if they improve the market by providing significant quoting at the NBBO in a large number of securities which the Exchange believes will improve market quality.

In terms of intra-market competition, the Exchange does not believe that the proposed rule change will impose any burden on competition not necessary or appropriate in furtherance of the purposes of the Act because the program is open to all member organizations on the same terms.

In sum, the proposed changes are designed to make the Exchange a more desirable venue on which to transact; however, if the changes proposed herein are unattractive to market participants, it is likely that the Exchange will lose market share as a result. Accordingly, the Exchange does not believe that the proposed changes will

impair the ability of member organizations or competing order execution venues to maintain their competitive standing in the financial markets.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received from Members, Participants, or Others

No written comments were either solicited or received.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The foregoing rule change has become effective pursuant to Section 19(b)(3)(A)(ii) of the Act.¹⁰

At any time within 60 days of the filing of the proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is: (i) necessary or appropriate in the public interest; (ii) for the protection of investors; or (iii) otherwise in furtherance of the purposes of the Act. If the Commission takes such action, the Commission shall institute proceedings to determine whether the proposed rule should be approved or disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic comments:

- Use the Commission's Internet comment form (<http://www.sec.gov/rules/sro.shtml>); or

¹⁰ 15 U.S.C. 78s(b)(3)(A)(ii).

- Send an e-mail to rule-comments@sec.gov. Please include File Number SR-Phlx-2021-47 on the subject line.

Paper comments:

- Send paper comments in triplicate to Secretary, Securities and Exchange Commission, 100 F Street, NE, Washington, DC 20549-1090.

All submissions should refer to File Number SR-Phlx-2021-47. This file number should be included on the subject line if e-mail is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet website

(<http://www.sec.gov/rules/sro.shtml>). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for website viewing and printing in the Commission's Public Reference Room, 100 F Street, NE, Washington, DC 20549, on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of the filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change. Persons submitting comments are cautioned that we do not redact or edit personal identifying information from comment submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR-Phlx-2021-47 and should be submitted on or before **[INSERT DATE 21 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER]**.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.¹¹

Jill M. Peterson,

Assistant Secretary.

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¹¹ 17 CFR 200.30-3(a)(12).